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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 05 2011

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). Noting that the record was deficient, the director issued a notice dated January 25, 2010, requesting that additional evidence be submitted in support of the petition. After the petitioner failed to submit the requested evidence, the director denied the petition citing the petitioner's failure to respond to the request for evidence as the sole basis for denial. Thus, the petition was dismissed for abandonment, pursuant to 8 C.F.R. § 103.2(b)(13)(i), which states the following:

> If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the application or petition may be summarily denied as abandoned, denied based on the record, or denied for both reasons.

Pursuant to 8 C.F.R. § 103.2(b)(15), a denial due to abandonment may not be appealed. Although the director properly advised the petitioner that there is no appeal from a denial based on abandonment, counsel filed an appeal anyway.[1] As there is no appeal from the director's denial, the petitioner's appeal must be rejected.

Furthermore, in order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal with the office where the unfavorable decision was made within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The record indicates that the director issued the decision on March 23, 2010. Although counsel claims that he did not receive a copy of the decision, a review of the record reflects that counsel was issued a copy of the decision. While counsel dated the appeal on April 23, 2010, it was not received by the director until Monday, March 3, 2010, 41 days after the decision was issued. The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). Accordingly, in the alternative, the appeal would be rejected as untimely pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1).[2]

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[1] The Form I-290B and counsel's "appeal brief" refer to the filing as both an appeal and motion. The instructions to the Form I-290B as well as the form itself are clear that only one box may be checked, indicating *either* an appeal or motion, not both. Given counsel's reference to an "appeal brief" and the fact that 8 C.F.R. § 103.5(a)(1)(iii), while allowing for a brief to *accompany* the filing of a motion, does not provide for extra time to submit a brief, the filing must be considered as an appeal. *Compare* 8 C.F.R. § 103.3(a)(2)(vii) which allows for additional time to submit a brief in support of an appeal.

[2] The AAO notes that the regulation at 8 C.F.R. § 103.3(a)(1)(v), provides that an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. On the Form I-290B, counsel indicated that a brief would be submitted within 30 days. However, as of the date of this

ORDER: The appeal is rejected.

decision, the AAO has received nothing further. As counsel did not specifically address the reasons stated for denial and did not provide any additional evidence, the appeal would be summarily dismissed were it not being rejected.